

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

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IN RE:)		
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ROBERT J. RECIO,)	CASE NO.	04-31573 (ASD)
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DEBTOR.)	CHAPTER	7
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ROBERT J. RECIO,)		
)		
PLAINTIFF,)		
)		
vs.)	ADV. PRO. NO.	04-3117
)		
ELLA M. KLEIN,)		
)		
DEFENDANT.)		
-----)		

APPEARANCES:

Robert M. Singer, Esq.
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Hamden, CT 06518

Attorney for Plaintiff

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Attorney for Defendant

MEMORANDUM OF DECISION ON MOTION TO DISMISS COMPLAINT

ALBERT S. DABROWSKI, Chief United States Bankruptcy Judge

I. INTRODUCTION

In this adversary proceeding, Robert J. Recio (hereafter the “Debtor”), asks this Court to declare that a certain debt owed to Ella M. Klein (hereafter the “Defendant”), is

dischargeable. Presently before the Court is the Defendant's Motion to Dismiss (Doc. I.D. No. 7) (hereafter, the "Motion"), seeking to dismiss the underlying Complaint for failure to state a claim upon which relief can be granted, see Fed. R. Civ. P. 12(b)(6), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012(b). Having now considered the Motion, the Debtor's Objection to Defendant's Motion to Dismiss (Doc. I.D. No.13), supporting memoranda of law, and argument of counsel at a hearing held September 8, 2004, the Court renders this Memorandum of Decision.

II. JURISDICTION

The United States District Court for the District of Connecticut has jurisdiction over the instant matter by virtue of 28 U.S.C. § 1334(b); and this Court derives its authority to hear and determine this matter on reference from the District Court pursuant to 28 U.S.C. § 157(a)(b)(1). This is a "core proceeding" pursuant to 28 U.S.C. § 157(b)(2)(I).

III. FACTUAL BACKGROUND

The relevant facts are straightforward, not disputed, and/or subject to judicial notice. In 1995, the Debtor filed a voluntary petition under Chapter 7, commencing Bankruptcy Case No. 95-51829, assigned to the Bridgeport Division of this Court, specifically to United States Bankruptcy Judge Alan H. W. Shiff, then Chief Judge. Within that case the present Defendant commenced an adversary proceeding (No. 96-5135) seeking a denial of the Debtor's discharge, or a determination of nondischargeability of its debt, pursuant to Bankruptcy Code Sections 727 and 523, respectively.

This Court presumes the reader's familiarity with the additional factual background set forth in a certain Memorandum and Order on Determination of Civil Contempt and Imposition of Sanctions (hereafter, the "Memorandum and Order"), (Doc. I.D. No. 76),

entered by Judge Shiff in that adversary proceeding; which factual background is incorporated herein by reference. With direct relevance to the instant matter, on March 20, 1998, within Adversary Proceeding No. 96-5135,

the plaintiff [Klein] filed [a] motion for a finding of civil contempt and the imposition of sanctions. A hearing on notice was conducted on October 25, 2000, at which the defendant [the Debtor] appeared and participated. At the conclusion of the trial, final arguments were scheduled and were thereafter rescheduled for November 29, 2000. The defendant [Debtor] had actual notice of the rescheduled hearing but failed to appear. In a bench ruling on that date, the defendant [Debtor] was found to be in contempt of this court's April 15, 1997 order. It was further determined that appropriate sanctions would be imposed on the defendant [Debtor].

Memorandum and Order, pp 1-2. In the Memorandum and Order Judge Shiff proceeded to rule that "[t]he debt owed to the plaintiff, in an amount to be established by the state court, is determined to be nondischargeable." (footnote omitted). The Memorandum and Order was not the subject of an appeal or request for reconsideration.

In the instant adversary proceeding, the Debtor asserts, *inter alia*, that "no court has determined that the debtor is not entitled to a discharge of this debt pursuant to 11 USC 523", Complaint, ¶ 2, and for all intents and purposes asks the undersigned judge to nullify Judge Shiff's Memorandum and Order insofar as it determines the relevant debt to be nondischargeable.

IV. DISCUSSION

A motion to dismiss is designed to test the legal sufficiency of the complaint and is not intended to weigh the sufficiency of evidence which might be presented at trial. Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). See also Gant v. Wallingford Board of Ed., 69 F.3d 669, 673 (2d Cir. 1995) ("The issue is not whether a plaintiff is likely

to prevail ultimately, *but whether the claimant is entitled to offer evidence to support the claims*") (citations and internal quotation marks omitted) (emphasis added).

On a motion to dismiss, the court's purview is limited to "the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993). It is upon this authority, that the Court looks to the Memorandum and Order, its determination of nondischargeability, and to principles of claim and issue preclusion to determine the instant matter.

The issue presently before this Court is identical to a matter determined by Judge Shiff in the Memorandum and Order. The nondischargeability determination by Judge Shiff was rendered by a court of competent jurisdiction, involved the identical parties, was actually litigated and actually decided; there was a full and fair opportunity to litigate in the prior proceeding, and the issue previously litigated was necessary to support, and concluded in, a valid and final judgment on the merits. See In re Sikorski, 239 B.R. 661, 662 (D. Conn. 1999), citing, National Labor Relations Board v. Thalbo Corp., 171 F.3d 102, 109 (2nd Cir. 1999). The Memorandum and Order is a valid, final order and determination of nondischargeability binding on the Debtor and not subject to collateral attack before the undersigned judge. See In re Paine, 283 B.R. 33 (9th Cir BAP 2002).

The Debtor's specific argument that this Court should not import into the instant proceeding Judge Shiff's prior determination of nondischargeability because he lacked authority to determine that issue in the context of the matter before him is wholly without merit. There was no *jurisdictional* infirmity in the Memorandum and Order. Judge Shiff had jurisdiction to rule on matters of contempt and dischargeability of debts. If, in the proper

exercise of that jurisdiction, Judge Shiff misinterpreted or misapplied the Bankruptcy Code and/or Rules, the Debtor's available remedies included an appeal or motion to reconsider. This was not done. Electing to forego such readily available and appropriate remedies, in favor of filing a new bankruptcy case, and seeking before a new judge a discharge applicable to the debt already determined nondischargeable, is an impermissible collateral attack on a valid and final judgment in a prior proceeding, contrary to principles of res judicata. Id. at 40-41. The preclusive effects of former litigation apply in bankruptcy, Brown v. Felson, 442 U.S. 127, 134-39 (1979); Grogan v. Garner, 498 U.S. 279, 285 (1991), and are "not defeated by error in the original judgment" In re Paine, supra at 39 (citing Federated Dept Stores v. Moitie, 452 U.S. 394, 398 (1981)).

V. CONCLUSION

For the foregoing reasons, the Motion is **GRANTED**. A separate order dismissing Adversary Proceeding No. 04-3117 shall be entered simultaneously herewith.

BY THE COURT

DATED: September 9, 2004

Albert S. Dabrowski
Chief United States Bankruptcy Judge

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ORDER DISMISSING ADVERSARY PROCEEDING

The Defendant's Motion to Dismiss, Doc. I.D. No. 7, having come before the Court, and the Court having received and reviewed the pleadings related thereto, and having heard and considered arguments of the parties thereon; and the Court having this day issued its Memorandum of Decision on Motion to Dismiss Complaint, in accordance with which it is hereby

ORDERED that Adversary Proceeding No. 04-3117 is **DISMISSED**.

BY THE COURT

DATED: September 9, 2004

Albert S. Dabrowski
Chief United States Bankruptcy Judge

